GAINING THE BEST SETTLEMENT IN AUTO INJURY CASES

I. ADDRESS IMPORTANT INITIAL CONSIDERATIONS

A. How to Screen an Auto Accident Case

1. Secure a detailed statement of the facts to evaluate liability.

To evaluate an auto accident case, the attorney must secure a detailed statement of how the collision occurred. A simple tool to jump start this process would be to secure and review the police accident report.

> **Practice Pointer:** Do not over rely on the police report. It is this author's experience that police reports commonly contain errors regarding the collision, including presenting only one driver's version of the collision. This can occur for several reasons, including the fact the officer only spoke to one driver and due to language difficulties with one of the drivers. Sometimes the officer simply chooses to disbelieve one of the drivers and ignores that version of the collision.

There can be no substitute for an in-depth interview of the client. If the client was not the driver, you may need to interview the driver, assuming he/she is not the at fault party. The interview should include the names of the streets/intersections, the direction of travel, a description of any traffic control devices, lane markings, speed of both vehicles, and the circumstances leading to the collision. I recommend asking where the client was coming from and where the client was going, including any stops along the way.

2. Evaluate for Damages

Always ask the potential client to describe the mechanism of injury, such as "my head hit the driver's side window." Also always ask what part of the body was injured and when the pain first began. The value of your claim will depend

upon the seriousness of injury, the length of treatment, the past medical expenses and any future injury and medical expenses.

Damages also take the form of a loss of earnings. A wage loss form should be presented and explained to the client early on, so the client understands the need to keep track of time missed due to injury and medical visits. The dates on the wage loss form should correspond with the disability slips provided by the treating doctor.

B. Weed Out Weak Cases in the Initial Interview and Assessment

1. Liability

Evaluate the facts of the collision with an eye towards whether you can establish negligence. The legal test is whether it is "more likely than not" that the other party caused the collision and further, whether the defense can also establish "more likely than not" that your client was also negligent (contributory negligence). However, do not give up on a case which may present a weak and unsubstantial argument for contributory negligence. The contributory negligence must be more than merely **trivial**. " To bar plaintiff's recovery on the grounds of contributory negligence, defendant had the burden of proving that the plaintiff's negligence was **substantial** and such that without it the accident would not have occurred." Lerwill v Regent Van & Storage, Inc., 217 Va. 490, 229 S.E.2d 880 (1976); Clinchfield Coal Corporation v. Osborne's Admr., 114 Va. 13, 75 S.E. 750, (1912).

2. Evaluate for Damages Sufficient to Justify Your Time

Not every collision will cause sufficient injury to justify legal representation.

Practice Pointer: Many insurers are fighting small claims, which are commonly referred to as MIST claims (minor impact - soft tissue injury) and you can find yourself spending far more hours than you expected. You may want to increase your attorney fee above the standard one-third to justify the time and effort expended on a small, but otherwise legitimate claim.

Always ask the potential client to describe the mechanism of injury, such as "my head hit the driver's side window." Also always ask what part of the body was injured and when the pain first began.

The key to the evaluation of damages in the initial interview is verifying that the injuries are serious enough to require more than just a few visits to healthcare providers. I look for cases where the potential client will require ongoing medical treatment, such as therapy, visits to medical doctors and diagnostic testing. Of course you can never be certain in the days immediately after a collision to what extent future treatment will be required, but you can at least confirm the client's level of pain and disability makes it probable that the damages will exceed $1,000.00. Anything less than such sum would certainly not be worth accepting, unless it is done as a favor or to promote your practice as a good-will gesture.

3. Pre-existing Conditions and Prior Claims

Pre-existing conditions and prior claims are fertile grounds for the defense bar. Inquire about prior injuries, prior claims and pre-existing conditions. It is important to learn up front to what extent the client has already had treatment and made prior claims which will diminish the value of your claim. Most prior claims are entered into a master data bank maintained by the insurance industry. The

claims adjuster with whom you will attempt to negotiate a settlement will have access to this data. You need to know at least as much about your client's history of prior injuries and claims as the claims adjuster.

Practice Pointer: Many people obtain regular care, also known as "maintenance", from chiropractors and other practitioners. This can reduce the value of a claim if the maintenance was close in time to the collision and involved the same body part injured in the collision. This can negatively affect the claim, especially if suit is filed. Find out if this is the case.

4. Client's Criminal Record

Plaintiff's lawyers have learned, sometimes the hard way, that the client's past criminal record can affect the value of the case. Always ask if your client has ever been arrested. If the answer is yes, make sure you identify and felonies or misdemeanors involving moral turpitude (lying-cheating-stealing), all of which are admissible in a civil trial. Va. Code § 19.2-269; Payne v Carroll, 250 Va 336, 461 S.E.2d 837 (1995). Payne also clarifies that the fact the client was convicted is admissible, but the specifics of the conviction are not admissible. If it is to your advantage, you can bring out the circumstances of the conviction on direct or re-direct examination.

Practice Pointer: There are circumstances where the criminal conviction is so far removed in time or otherwise so irrelevant that it may be tactically to your advantage if the defense were to use the conviction to attack an otherwise credible client who has a solid case. For example, if you have a 50 year old government worker who was arrested at age 18 for selling 1 ounce of

marijuana, for which he pleaded to a felony, you may not have any problem with your case so long as the conviction is revealed when asked in discovery. Any thought that the client is hiding the conviction by failing to reveal it when first asked could lead to effective cross-examination of your client at trial.

C. CONCRETE TIPS FOR EVALUATING PAIN AND SUFFERING

1. Understand The Injury

The claims adjusters will have the medical records reviewed by someone with a medical background. The days of negotiating with a claims adjuster who will look at the bills and briefly read the records, and then offer you 2 ½ x the bills are gone. The claims adjuster will likely have a detailed memorandum prepared by his medical reviewer. You must be able to discuss the injuries and treatment in detail. In most cases, this should not present a problem, as you can look up medical terms online, and you can seek clarification from your client's physicians.

Practice Pointer: You must read every word of the medical reports and records. Many attorneys fail to take the time needed to understand the nature and extent of injury because they fail to secure and then read every record generated by the client's treatment.

Today, many claims adjusters are offering only the medical bills, with perhaps a few hundred dollars for pain and suffering, even when the bills total thousands. While a minority of adjusters may actually believe that the injury did not result in pain and suffering, most adjusters are simply ordered to offer these low sums, with the hope most claimants will not want to take the time and expense to litigate.

2. Argue Pain and Suffering Directly From the Medical Records

Review the medical records for objective findings which are consistent with a painful injury. It is common to find terms such as "spasm", "trigger points" and "limited or restricted range of motion." These findings are reproducible by any provider and are not solely dependent on the word of the patient. Also look for the type and amount of prescription strength medication consumed by the patient. The use of such medication is also consistent with a painful injury. It is common to find references to pain on a scale of 1-10 in the medical records. While the rating is from the patient, a high number that is consistent with other findings in the record can be useful.

3. Seek Facts About Activities of Daily Living (ADL)

It is important to discuss with the client how his/her daily affairs were affected by the injuries. For example, many clients have small children who require a great expenditure of energy, a serious issue for an injured client who cannot bend or turn her head or sleep. Other activities which are likely to cause pain are household chores, such as cooking, cleaning, vacuuming, laundry and grocery shopping. The author has found that physical therapy notes may be most helpful in identifying activities affected by the injury.

D. DETERMINING DAMAGES - LOOK AT THE BIG PICTURE BUT DON'T FORGET THE DETAILS

1. The Big Picture

You must assess the accident in terms of impact, force applied to the occupants, amount of property damage and the credibility of your client. A read flag should appear if your client now has pain from head to toe, but the client

made no or few complaints at the scene and the collision appears to be very low impact. The claim must pass the "smell test." If it doesn't smell right, there are usually problems under the surface. However, many otherwise legitimate claims will come with less than spectacular property damage. Do not give up on every claim where the property damage is modest or even minimal. A good physician will not be dissuaded from supporting an injury claim just because the rear of the car looks intact. The issue is the force applied to the occupant, and the stiffer the car and more it "holds its shape", the more force is likely transferred to the occupants. This can be a tough sell, but lay witnesses (such as family members and co-workers) can be invaluable in establishing the credibility of the client. In the end, the judge or jury will likely decide the damages based on how they view the client.

Practice Pointer: Where you have reason to believe the client was truly injured, but the damage appears to be modest, consider hiring a damage appraiser to look at the car, measure the frame for bending, look for damage behind the bumper covers which are usually designed to pop back into place even in a significant impact, and look for uneven gaps around the doors and truck, which also can reveal structural damage not readily apparent.

2. The Settlement Money Is In the Details

Do not forget about the law, which gives you the right to argue damages, such a mental anguish, which can be inferred from an injury. Even where the physical injury is slight, you may have a good argument for mental anguish and suffering. The following passage form a recent Virginia Supreme Court case is

instructive:

We have held, for well over a century, that mental anguish may be inferred from bodily injury and that it is not necessary to prove it with specificity. Norfolk & W. Ry. Co. v. Marpole, 97 Va. 594, 599-600, 34 S.E. 462, 464 (1899). Mental anguish, when fairly inferred from injuries sustained, is an element of damages. Bruce v. Madden, 208 Va. 636, 639-40, 160 S.E.2d 137, 139 (1968).

In the present case, the plaintiff suffered physical injury, albeit remarkably slight under the circumstances, as a proximate result of the defendants' negligence. Thus, mental anguish could be inferred by the jury and would constitute an element of damages. The plaintiff makes no claim, however, that her mental state after the accident, and the deterioration of her physical condition, resulted from her relatively slight bodily injuries. Her claimed damages relate almost entirely to emotional trauma suffered as a result of the accident. The question remains: What, if any, limitations apply to the sources of emotional distress for which the plaintiff may be compensated in damages?

*Here, the plaintiff was clearly entitled to be compensated in damages [***14] for any emotional distress she suffered as a consequence of the physical impact she sustained in the accident. Such distress might include shock and fright at being struck three times, turned over, left hanging upside down in her seatbelt and experiencing physical pain. It might also include anxiety as to the extent of her injuries, worry as to her future well-being, her ability to lead a normal life and to earn a living. It might include fear of disability, deformity, or death. Such factors were proper subjects for the jury's consideration because they might fairly be inferred from the physical impact of the collisions upon her person. They might also be taken into account as factors causing exacerbation of her pre-existing mental and physical conditions.*

Kondaurov v. Kerdasha, 271 Va. 646, 629 S.E.2d 181 (2006).

Of course, you must have the facts to take advantage of the law set forth above. A good attorney will consider the law at the same time he/she is arguing damages. Never draft a settlement demand letter which simply adds up the medical bills and asks for a large sum of money. This type of demand letter will usually tip the adjuster to fact you may not have read and digested the entire medical file, and it will leave you with little ammunition when the claims adjuster takes quotes and findings out of context in an effort to diminish the claim. Your settlement demand

letter should always include a summary of the treatment and findings.

Practice Pointer: A thorough review of the medical records prior to initiating settlement discussions will also enable you to catch, and correct, obvious factual errors in the medical records. Under HIPPA, the patient has the right to demand his physician correct an error, or insert the patient's statement of fact into the record. This provision in HIPPA does not pertain to the opinions of the physician.

3. Consider the Policy Limits

In most cases the settlement or verdict will be limited by the amount of available liability insurance. This insurance will usually come from the defendant's insurance policy, but not always. If the defendant is uninsured, underinsured or immune from simple negligence, the insurance money will come from your client's own policy through his uninsured or under-insured motorhist coverage. In Virginia, minimum liability limits have been stuck at $25,000.00 for at least 20 years. Until recently, you could not determine the amount of insurance carried by the defendant until you filed suit. After filing suit, the rules of discovery allow you to request by interrogatory the limits of insurance coverage. Va Supreme Ct Rule 4:1(b)(2).

Practice Pointer: Pursuant to a statute effective July 1, 2008, you can learn the limits of liability coverage by writing to the claims adjuster if the specials damages (medical bills and wage loss) total at least $12,500.00. The statute is set forth below.

§ 8.01-417 (C) *After he gives written notice that he represents an injured person, an attorney, or an individual injured in a motor vehicle accident if he is not represented by counsel, may, prior to the filing of a civil action for personal injuries sustained as a result of a motor vehicle accident, request in writing that the insurer disclose the limits of liability of any motor vehicle liability or any personal injury liability insurance policy that may be applicable to the claim. The requesting party shall provide the insurer with the date of the motor vehicle accident, the name and last known address of the alleged tortfeasor, a copy of the accident report, if any, and the claim number, if available. The requesting party shall also submit to the insurer the injured person's medical records, medical bills, and wage-loss documentation, if applicable, pertaining to the claimed injury. If the total of all such medical bills and wage losses equals or exceeds $ 12,500, the insurer shall respond in writing within 30 days of receipt of the request and shall disclose the limits of liability at the time of the accident of all such policies, regardless of whether the insurer contests the applicability of the policy to the injured person's claim. Disclosure of the policy limits under this section shall not constitute an admission that alleged injury or damage is subject to the policy. Information concerning the insurance policy is not by reason of disclosure pursuant to this subsection admissible as evidence at trial.*

E. COMPLAINT FOR THE CIRCUIT COURT AND WARRANT IN DEBT OR COMPLAINT FOR THE GENERAL DISTRICT COURT

1. Complaint in Circuit Court

To file a motor vehicle accident lawsuit in the circuit court, usually for an amount greater than $15,000.00, you must file a complaint. The complaint need only comply with notice pleading requirements, and need not be particularly detailed. Rule 1:4(d) states that "every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim. Rule 1:4(j) states that "brevity is enjoined as the outstanding characteristic of good pleading. In any pleading, a simple statement, in numbered paragraphs, of the essential facts is sufficient." The pleading must contain the office address, telephone number and regular facsimile

number of counsel of record. Rule 1:4(l). Counsel must also sign the pleading. Rule 1:4(c).

Further details are set forth in Rule 3:2. If you are asking for money damages, be sure to include the amount requested in the *ad damnum* clause of the Complaint.

Rule 3:2. Commencement of Civil Actions.
(a) Commencement. A civil action shall be commenced by filing a complaint in the clerk's office. When a statute or established practice requires, a proceeding may be commenced by a pleading styled "Petition." Upon filing of the pleading, the action is then instituted and pending as to all parties defendant thereto. The statutory writ tax and clerk's fees shall be paid before the summons is issued.
(b) Caption. The complaint shall be captioned with the name of the court and the full style of the action, which shall include the names of all the parties. The requirements of Code § 8.01-290 may be met by giving the address or other data after the name of each defendant.
(c) Form and Content of the Complaint. (i) It shall be sufficient for the complaint to ask for the specific relief sought. Without more it will be understood that all defendants mentioned in the caption are made parties defendant and required to answer the complaint; that proper process against them is requested; that answers under oath are waived, except when required by law, and that all relief authorized by law and demanded in the complaint may be granted. No formal conclusion is necessary.
(ii) Every complaint requesting an award of money damages shall contain an ad damnum clause stating the amount of damages sought. Leave to amend the ad damnum clause shall be available under Rule 1:8.

Attached as Exhibit A is a sample Complaint.

Practice Pointer: You will be limited to the amount claimed in *ad damnum* clause of your complaint. Unlike federal court, you cannot amend the complaint to increase the amount sued for after the judgment or verdict.

2. Warrant in Debt or Complaint in General District Court

You should consider filing in the general district court if you claim will not exceed $15,000.00. The general district court also has exclusive jurisdiction over any claim of $4,500.00 or less. Many attorneys believe your chances of a reasonable recovery in a smaller accident are better in the general district court, as the claim will be heard by a judge, not a jury. You may file a warrant in debt, which is a pre-printed form available at the clerk's office. The warrant in debt will not allow space for more than a simple line entry that the plaintiff was injured in a motor vehicle collision on a particular date. Attached as Exhibit B is a Warrant in Debt. Such a filing will usually generate a request by the defendant for a "bill of particulars" requiring counsel to outline more specifically the facts of the accident. For this reason, one should consider filing a complaint. The complaint will have facts sufficient to either convince the court to deny a request for a bill of particulars, or you will recopy the pleading and label it a "bill of particulars."

Rule 7B:4. Trial of Action.
(a) Method of bringing action. A civil action in a general district court may be brought by warrant, summons or complaint directed to the sheriff or to any other person authorized to serve process, requiring such individual to summon the person against whom the claim is asserted to appear before the court on a certain day to answer the complaint of the plaintiff set out in the warrant, summons or complaint.
(b) When action heard. If all parties appear and are ready for trial on the return date of the warrant, summons or complaint, the court may proceed with the trial of the case.

Practice Pointer: Despite the above cited statute, the clerks at the Fairfax County General District Court refuse to accept a pleading titled "Complaint" and insist you label it "Motion for Judgment."

Either party can appeal "de novo" to the Circuit Court within 10 days of the judgment, although the defendant may have to post a bond in the amount of the judgment prior to perfecting the appeal. Va. Code § 8.01-129.

EXHIBIT A

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF _____

	:	
Plaintiff,	:	
	:	
v.	:	Case #:
	:	
Defendant.	:	

COMPLAINT

1. Plaintiff (insert name) is an adult resident of , Virginia.

2. Upon information and belief, defendant (insert name) is an adult resident of , Virginia.

3. On or about , at approximately .m., plaintiff was proceeding in the right lane of westbound of Old Keene Mill Road.

4. At that time and place defendant pulled out of a shopping mall and attempted to cross plaintiff's westbound lane's to travel east on Old Keene Mill Road.

5. At said time and place plaintiff blew her horn and attempted to worn defendant proceeding into her lane of travel.

6. Despite blowing her horn, defendant proceeded into the path of plaintiff's vehicle.

7. Plaintiff was unable to avoid colliding with defendant's vehicle.

8. Defendant had a duty to operate her vehicle with due care and regard for others using the highway, including plaintiff.

EXHIBIT B
WARRANT IN DEBT

VA. CODE ANN. § 16.1-79

..... General District Court
CITY OR COUNTY

.....
STREET ADDRESS OF COURT

TO ANY AUTHORIZED OFFICER: You are commanded to summon the Defendant(s).
TO THE DEFENDANT(S): You are summoned to appear before this Court at the above address

on..... to answer the Plaintiff(s)' civil claim (see below).
RETURN DATE AND TIME

..... _____
DATE ISSUED ☐ CLERK ☐ DEPUTY CLERK ☐ MAGISTRATE

Claim: Plaintiffs claim that Defendant(s) owe Plaintiff(s) a debt in the sum of

$ ..... net of any credits, with interest at.....% from ..... until paid.
INTEREST RATE DATE FROM WHICH IS DUE

$.....costs, and $..... attorney's fees with the basis of this claim being
COSTS ATTY FEE

☐ Open Account ☐ Contract ☐ Note ☐ Other (EXPLAIN).....

.....

Homestead Exemption waived? ☐ Yes ☐ No ☐ cannot be demanded

..... _____
DATE ☐ PLAINTIFF ☐ PLAINTIFF'S ATTY. ☐ PLAINTIFF'S EMPLOYEE

Case Disposition

JUDGMENT that Plaintiff(s) recover against ☐ named Defendant(s) ☐.....

$ ..... net of any credits, with interest at.....% from ..... until paid.
INTEREST RATE DATE FROM WHICH IS DUE

$.....costs, and $..... attorney's fees
COSTS ATTY FEE

Homestead Exemption waived? ☐ Yes ☐ No ☐ cannot be demanded

☐ JUDGMENT FOR ☐ NAMED DEFENDANT ☐ .....

☐ NON-SUIT ☐ DISMISSED.....

Defendant(s) Present? ☐ Yes.....
☐ No

..... _____
DATE JUDGE

FORM DC-412 11/88 (114:9-015 2/92)

RETURN DATE CASE NO.

.....
PLAINTIFF(S)

.....

.....

.....

V.

.....
DEFENDANT(S)

.....

.....

.....

WARRANT IN DEBT

RECEIPT NO.	DATE FEE RECEIVED

* * *

TO DEFENDANT: You are not required to appear; however, if you fail to appear, judgment may be entered against you. See the additional notice on the back side about requesting a change of trial location.

☐ To dispute this claim, you must appear on the return date to try this case.
☐ To dispute this case, you must appear on the return date for the judge to set another date for trial.

Bill of Particulars ....
ORDERED DUE

Grounds of Defense ....
ORDERED DUE

ATTORNEY FOR PLAINTIFF(S)

.....

ATTORNEY FOR DEFENDANT(S)

.....

RETURNS: Each defendant was served according to law, as indicated below, unless not found.

NAME ....

....

ADDRESS ....

....

☐ PERSONAL SERVICE Tel. No. ....

Being unable to make personal service, a copy was delivered in the following manner:

☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above.

____

____

☐ Posted on front door or such other door as appears to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ Served on Secretary of the Commonwealth.

☐ Not found

______________________________ SERVING OFFICER

.... DATE   for ______________________________

NAME ....

....

ADDRESS ....

....

☐ PERSONAL SERVICE Tel. No. ....

Being unable to make personal service, a copy was delivered in the following manner:

☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above.

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☐ Served on Secretary of the Commonwealth.

☐ Not found

______________________________ SERVING OFFICER

.... DATE   for ______________________________

NAME ....

....

ADDRESS ....

....

☐ PERSONAL SERVICE Tel. No. ....

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____

____

☐ Posted on front door or such other door as appears to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ Served on Secretary of the Commonwealth.

☐ Not found

______________________________ SERVING OFFICER

.... DATE   for ______________________________

To the Defendant(s): If you believe that Plaintiff(s) should have filed this suit in a different city or county, you may file a written request to have the case moved for trial to the general district court of that city or county. To do so, you must do the following:

1. Prepare a written request which contains (a) this court's name, (b) the case number and the "return date" as shown on the other side of this form in the top right corner, (c) Plaintiff(s)' name(s) and Defendant(s)' name(s), (d) "I move to object to venue of this case in this court because" and state the reasons for your objection and also state in which city or county the case should be tried, and (e) your signature and mailing address.
2. File the written request in the clerk's office before the trial date (use the mail at your own risk) or give it to the judge when your case is called on the return date. Also send or deliver a copy to plaintiff.
3. If mailed to the court, you will be notified of the judge's decision.

I certify that I mailed a copy of this document to the defendants named therein at the address shown therein on

.... DATE   ______________________________

☐ Plaintiff
☐ Plaintiff's Atty.
☐ Plaintiff's Employee

Fi. Fa. issued on ....

Interrogatories issued on ....

Garnishment issued on ....

....